

CENSORSHIP AND SURVEILLANCE IN THE GLOBAL INFORMATION AGE:—

ARE TELECOMMUNICATIONS COMPANIES AGENTS OF SUPPRESSION OR REVOLUTION?

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The Internet is a wild land with its own games, languages and gestures through which we are starting to share common feelings

—Ai Weiwei¹

If you want to liberate a society, just give them the Internet

—Wael Ghonim²

INTRODUCTION

As global access to Internet and communications technology (ICT) grows, individuals gather on the Internet to discuss everything from the best breakfast cafés to opinions about the latest governmental decrees.³ In early 2011, increased access to ICTs allowed individuals in Tunisia and Egypt to lift the authoritarian veil of the oppressive governments that stifled freedom of expression for

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1. Ai Weiwei, *China's Censorship Can Never Defeat the Internet*, GUARDIAN, Apr. 15, 2010, at 26.
2. Rebecca MacKinnon, *Our Web freedom at the Mercy of Tech Giants*, CNN, July 31, 2011, http://articles.cnn.com/2011-07-31/opinion/mackinnon.tech.freedom_1_julian-assange-free-speech-wikileaks?_s=PM:OPINION (discussing Wael Ghonim, a Dubai based Google executive whose Facebook group, "We Are All Khaled Said," helped stimulate the Egyptian uprisings in 2011); *See also Wael Ghonim: Creating A 'Revolution 2.0' In Egypt*, NPR (Feb. 9, 2012), <http://www.npr.org/2012/02/09/146636605/wael-ghonim-creating-a-revolution-2-0-in-egypt>.
3. *See* Amir Hatem Ali, Note, *The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide and Beyond*, 24 HARV. HUM. RTS. J. 185, 187- 89 (2011) (discussing increased access to the Internet worldwide).

decades.⁴ Individuals sought out safe digital spaces, initially beyond the reach of the government's eye, to mobilize organized political action in the streets of Tunis and Cairo.⁵ Online communities harnessed the digital space, allowing any individual to become "a town crier with a voice that resonates farther than it could be heard from any soapbox."⁶ The throngs of demonstrators in early 2011 were armed with cell phone images of police brutality⁷ and growing social cohesion that were instantly uploaded onto the Internet to be viewed by a global audience.⁸

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4. Kurt Anderson, *The Protestor*, TIME, Dec. 26, 2011, at 60.
 5. Phillip N. Howard, Sheetal D. Agarwal & Muzammil M. Hussain, *The Dictator's Digital Dilemma: When Do States Disconnect Their Digital Networks?*, 13 ISSUES TECH. INNOVATION 1, 2 (Oct. 2011), available at http://www.brookings.edu/~media/Files/rc/papers/2011/10_dictators_digital_network/10_dictators_digital_network.pdf (demonstrating how technology aided in mobilizing pro-democracy protests); see also Jennifer Preston & Brian Stelter, *Cellphones Become the World's Eyes and Ears on Protests Across the Middle East*, N.Y. TIMES, Feb. 19, 2011 at A11 (stating how cell phones played an important role in political uprisings in Cairo and Tunis); see also David Batty, *Arab Spring Leads Surge in Events Captured on Cameraphones*, GUARDIAN, Dec. 29, 2011, at 19 (referring to images captured by cell phone cameras as "citizen media" and noting, "Post Egypt, in places like Libya, Yemen and Syria, citizens posting online have been the primary lens through which people have been able to see what is happening on the ground").
 6. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (ruling that provisions in the Community Decency Act prohibiting indecent communications by means of telecommunications device to persons under age 18, or sending patently offensive communications through use of interactive computer service to persons under age 18, were unconstitutional as content-based blanket restrictions on speech).
 7. *Egypt: Demonstrators Defy Riot Police, Censorship*, HUM. RTS. WATCH, Jan. 28, 2011, <http://www.hrw.org/news/2011/01/28/egypt-demonstrators-defy-riot-police-censorship>.
 8. Hillary R. Clinton, U.S. Sec'y of State, Remarks on Internet Freedom (Jan. 21, 2010), available at <http://www.state.gov/secretary/rm/2010/01/135519.htm> ("The freedom to connect is like the freedom of assembly, only in cyberspace. It allows individuals to get online, come together, and hopefully cooperate. Once you're on the Internet, you don't need to be a tycoon or a rock star to have a huge impact on society."); see also Michael H. Posner, Asst. Sec'y of State, Remarks on Internet Freedom and Responsibility (Oct. 25, 2011), available at <http://www.state.gov/g/drl/rls/rm/2011/176144.htm>; see also U.N. Special Rapporteur, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 19, U.N. Doc. A/HRC/17/27 (May 16, 2011) [hereinafter U.N. Report] ("Web 2.0 services, or intermediary platforms that facilitate participatory information sharing and collaboration in the creation of

Social media's arrival in the ICT sector strengthened social bonds, allowing demonstrators to quickly become informed, mobilize, and join masses of individuals with shared sentiments.⁹ Research conducted by Philip N. Howard on technology and political change in the Islamic world indicates that ICT do not cause change alone. Rather, development of ICT likely depends on adequate ICT utilization.¹⁰ However, the growing use of ICT to voice opinions against political powers presents fearful governments and political leaders with a dilemma. The Internet, which boosts trade and social cohesion, also undermines oppressive governmental structures.¹¹ How much control an oppressive government exerts over telecommunications companies determines how successfully dissidents within a nation can utilize ICT to induce political change.¹² The more strategically a government directs ICT companies operating within the country, the greater control it will have in condensing the dissent's voice into a manageable and monitored digital space.¹³

On January 28, 2011, this compression took the form of desperate measures by the Egyptian government to choke off the flow of information between activists and the global audience following events online.¹⁴ The Egyptian government flipped a "kill switch" that severed the country's cross-border Internet communications, and essentially wiped Egypt from the digital global map for five days.¹⁵

Numerous governments are seeking to control online citizen speech by pressuring ICT companies to aid in censorship in ways that threaten fundamental rights to privacy and freedom of expression.¹⁶

content, individuals are no longer passive recipients, but also active publishers of information.").

9. Anderson *supra* note 4, at 60.

10. REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 53 (2012).

11. See Ali, *supra* note 3, at 185-89 (discussing the use of the Internet in protesting the Egyptian Government).

12. MACKINNON, *supra* note 10, at 53.

13. *Id.* at 54.

14. James Cowie, *Egypt Leaves the Internet*, RENESYS (Jan. 27, 2011, 7:56 PM), <http://www.renesitys.com/blog/2011/01/egypt-leaves-the-internet.shtml>.

15. *Id.*; see also Howard, *supra* note 5, at 2.

16. GLOBAL NETWORK INITIATIVE, <http://globalnetworkinitiative.org> (last visited March 30, 2013); see Christopher Rhoads & Loretta Chao, *Iran's Web Spying Aided by Western Technology*, WALL ST. J., June 22, 2009 at A1 (discussing the role of European telecommunications companies, including Siemens AG and Nokia, in aiding the Iranian Government to develop "one of the world's most sophisticated mechanisms for controlling and censoring the Internet," which allows the regime to monitor the content of online speech on a massive scale); see also

In turn, ICT companies face a quandary: either serve as an agent of the state's suppression tactics or defend the user's right to 'speak' online and indirectly protect an avenue for revolution. Underlying this dilemma is the question of ICT companies' social responsibility. American economist Milton Friedman suggests this responsibility is narrowly focused on increasing profits.¹⁷ However, pressure on companies to adhere to human rights standards is continually increasing. Former U.S. Secretary of State Hillary Clinton highlighted the importance in the private sector emphasizing freedom of the digital space in order to avoid the suppressive influences of host governments.¹⁸

ICT companies bear a duty to protect users' rights to freely access and utilize telecommunications platforms. As mediums for communication, ICT companies can influence the course of nations' social and political domains, including governmental policy. Cooperation between ICT companies on issues of social responsibility could give these entities the upper hand by negotiating collectively with restrictive governments.¹⁹ This Comment, as Part I details, explores the predicament faced by ICT companies operating in Internet restrictive countries. Part II lays a framework of domestic and international law regarding freedom of expression on the Internet. Part III examines the corporation's role as a social actor under a corporate social responsibility model. Part IV evaluates the benefits and challenges of private and legislative endeavors currently underway to tackle corporate complicity with Internet restrictive governments, including the Global Network Initiative and the proposed Global Online Freedom Act.²⁰ This Comment will conclude with suggestions for how companies should proceed as social actors with a role in influencing legislation. A company's role in influencing policy and its duty to cater to its ethical investors will ultimately determine whether legislation is passed, how it is adhered to, and

Raphael G. Satter, *Vodafone: Egypt Forced Us to Send Text Messages*, SALON (Feb. 3, 2011) http://www.salon.com/2011/02/03/egypt_vodafone_text_messages/ (alleging Egyptian authorities forced Vodafone to send pro-government text messages to its consumer based during the uprisings in early 2011; and that Vodafone protested to Egyptian authorities).

17. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 122.
18. Hillary R. Clinton, U.S. Sec'y of State, Remarks at the Conference on Internet Freedom (Dec. 8, 2011), available at <http://www.state.gov/secretary/rm/2011/12/178511.htm>.
19. *Id.*
20. Global Online Freedom Act of 2011, H.R. 491, 112th Cong. (2011)

whether access to the Internet will be protected at the expense of increasing profit.

I. CORPORATION AS THE MIDDLEMAN: GROWING CHALLENGES IN THE AGE OF INTERNET

Communication

Governments are growing increasingly wary of the Internet's power to promote opinions of dissent and activism. In response, repressive governments attempt to unilaterally censor online content.²¹ To enforce Internet censorship, these governments solicit assistance from ICT companies to track, monitor, and censor communications that conflict with state policy. However, by complying with such governments, ICT companies become targets of one-sided actions by dissent leaders to restrict Internet content without the "consent of the networked."²² A government's interference in the operation of digital networks can occur in a number of ways, with varying degrees of severity, including:

[O]nline, by shutting down political websites or portals; offline, by arresting journalists, bloggers, activists, and citizens; by proxy, through controlling Internet service providers, forcing companies to shut down specific websites or denying access to disagreeable content; and in most extreme cases, shutting down access to entire online . . . networks.²³

Two main circumstances allowed the Egyptian Government to shut down the Internet for five days in January 2011.²⁴ First, the Government controlled the fiber optic pipelines carrying information on domestic networks, as well as across borders.²⁵ Government-owned telecommunications companies then leased access to the pipelines to

21. MACKINNON, *supra* note 10, at xxii-xxiii; *see* Cowie, *supra* note 14.

22. MACKINNON, *supra* note 10, at xxii-xxiii; *see also* Jessica E. Bauml, Note, *It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship*, 63 FED. COMM. L.J. 697, 703-04 (2011).

23. Howard, *supra* note 5, at 5.

24. *See, e.g.*, Cowie, *supra* note 14; *see also* Earl Zmijewski, *Egypt's Net on Life Support*, RENESYS, (Jan 31, 2011, 12:05 PM), <http://www.renesys.com/blog/2011/01/egypts-net-on-life-support.shtml> (providing a detailed analysis of the internet blackout in Egypt).

25. James Glanz & John Markoff, *Egypt's Autocracy Found 'Off' Switch for Internet*, N.Y. TIMES, Feb. 16, 2011 at A1, A10 (observing Telecom Egypt, a government owned company, "owns virtually all the country's fiber-optic cables" and is "[o]ne of the government's strongest levers").

privately owned Internet service providers.²⁶ The privately owned companies granted access to the Egyptian Government, allowing authorities to control and cut off the pipelines, ceasing the flow of information.²⁷ Egypt's domestic Internet should have continued to function after the shutdown, but Egypt's domestic networks rely on "moment-to-moment information from systems that exist only outside the country," including Google, Microsoft or Yahoo email servers. For this reason, the shutdown became a nationwide internet blackout.²⁸ Second, the Egyptian Government required all domestic and international ICT companies to sign licensing agreements with the state.²⁹ Each licensing agreement required the company to shut down if the Government so instructed. This left domestic and foreign companies, such as Vodafone, without legal grounds to challenge the order.³⁰ The Egyptian government was successful in flipping the Internet kill switch after targeting the centralized "choke points" in the country's information infrastructure.³¹

While the Internet provides a tool for political dissent, it can also solidify governmental control.³² A company's compliance with a government request turns the private network into subtle but invasive extensions of government power, in a type of "networked authoritarianism."³³ China is an example of an authoritarian regime

26. MACKINNON, *supra* note 10, at 51.

27. *Id.* ("[E]ven if an ISP were to keep its internal links running, the reliance of so many local web and email operations on overseas hosting and domain services means that even most domestic websites cannot load and e-mails cannot be sent within the country when the government cuts off international access.").

28. Glanz, *supra* note 25 (noting other external systems include "data centers in the United States; and the Internet directories called domain name servers, which can be physically located anywhere from Australia to Germany").

29. MACKINNON, *supra* note 10, at 51.

30. Glanz, *supra* note 25; MACKINNON, *supra* note 10, at 51.

31. See Glanz, *supra* note 25 (noting that despite the Internet's decentralized design, Internet traffic actually travels through "vast centralized exchanges – potential choke points that allow many nations to monitor, filter or in dire cases completely stop the flow of Internet data"). Similar arrangements are common in other authoritarian countries, such as Syria, where the Syrian Telecommunications Establishment controls the bulk of international information flow through the single pipeline that connects to Cyprus. Glanz, *supra* note 26.

32. Anupam Chander, *Googling Freedom*, 99 CAL. L. REV. 1, 8 (2011) (discussing general attempt by human rights law to impact the obligations of States and not corporations).

33. MACKINNON, *supra* note 10, at xxii (noting networked authoritarianism refers to the government's co-optation of the private sector).

that has not only survived, but also thrived within the Internet age, with the aid of domestic and multinational corporations.³⁴ The Chinese Government provides no transparency or public accountability as to operation and regulation of information networks.³⁵ By co-opting the country's information networks, the Government both monitors and censors political content.³⁶ A corporation's participation in such arrangements allows an undemocratic regime to sustain control over Internet services in order to monitor opposition to the ruling power.³⁷ Such networked authoritarianism and authoritarian deliberation are to varying degrees used globally,³⁸ including in the United States³⁹ and United Kingdom.⁴⁰ In response to such incidents by Western governments, the Chinese state-run media, Xinhua News Agency, reported that

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34. *Id.*, at xiv (discussing how the author was inclined to focus on China as “exhibit A”).
35. *Id.*, at 32 (finding Chinese government's lack of transparency and “co-option of the private sector in carrying out political censorship and surveillance” are “key components of . . . China's networked authoritarianism”).
36. *Id.*, at 34 (describing the Chinese Government's surveillance of potential political opposition by closely monitoring “online chatter” in order to “address issues and problems before they get out of control”).
37. *Id.*, at xxii (noting how theocratic governments, like Iran, are also utilizing such mechanisms of control over ISPs).
38. *Id.*, at 53; see also Ian Katz, *Web Freedom Faces Greatest Threat Ever, Warns Google's Sergey Brin*, *GUARDIAN* April 15, 2012, at 1. (“Ricken Patel, co-founder of Avaaz, the 14 million-strong online activist network which has been providing communication equipment and training to Syrian activists, echoed Brin's warning: ‘We've seen a massive attack on the freedom of the web. Governments are realising the power of this medium to organize people and they are trying to clamp down across the world, not just in places like China and North Korea; we're seeing bills in the United States, in Italy, all across the world.’”).
39. See Michael Cabanatuan, *BART Admits Halting Cell Service to Stop Protests*, *SAN FRANCISCO CHRON.*, (Aug. 12, 2011) <http://www.sfgate.com/news/article/BART-admits-halting-cell-service-to-stop-protests-2335114.php>; see also MACKINNON, *supra* note 10, at xiv (explaining how San Francisco's local subway system, BART, “shut down wireless service at several stations to prevent a planned protest against a shooting by BART police of an allegedly knife-wielding man”).
40. See Trevor Timm, *The UK Government's War on Internet Freedom*, *AL JAZEERA* (April 13, 2012), <http://www.aljazeera.com/indepth/opinion/2012/04/201241373429356249.html>; see also MACKINNON, *supra* note 10, at xiv (reporting U.K. Prime Minister David Cameron's controversial remarks in August 2001 for “expanded government power to monitor and restrict the British public's access to mobile services as well as to social networks”).

proper web monitoring is “legitimate and necessary” for the overall “benefit of the general public.”⁴¹

Governments globally are placing increasing demands on ICT companies to choose between the government and the individuals who use the Internet through ICT as platform for dissident expression. Companies, in turn, are making available hardware and software that aid the restriction of Internet access.⁴² When an ICT company cooperates with governments to implement restrictive Internet censorship, such as by “sell[ing] surveillance equipment to the security agency of Syria or Iran,” the ICT company should be aware that the aid provided to the repressive state will be used to violate rights.⁴³ A company providing materials that restrict Internet access or reveal users’ identities not only impinges on individuals’ right to anonymous speech and access to the Internet, but also aids the government’s continuing violations of individuals’ human rights. Corporate accountability advocates argue that ICT companies play a significant role in contributing to a government’s ability to enforce such systematic abuses of human rights.⁴⁴

One major policy question asks whether U.S. companies have obligations to Internet users dissenting against such repressive governments and whether those obligations trump traditional concerns of profit.⁴⁵ This question extends to individuals living under any Internet restrictive regime where U.S. ICT companies operate. The solution is simple: Companies that comply with government requests to abridge internationally protected rights to discover and spread political truth should face the wrath of international displeasure.⁴⁶ Justice Brandeis, in *Whitney v. California*,⁴⁷ explained

41. MACKINNON, *supra* note 10, at xv.

42. Clinton, *supra* note 18.

43. *Id.*

44. *Id.* (voicing need for “the private sector to embrace its role in protecting internet freedom”).

45. See, e.g., Chander, *supra* note 32, at 8 (discussing Yahoo’s establishment of fund to aid Chinese dissidents and adoption of human rights policy that “commits them to consider human rights as they offer their services around the world”).

46. See ROBERT FARIS ET AL., ONLINE SECURITY IN THE MIDDLE EAST AND NORTH AFRICA, (BERKMAN CTR. FOR INTERNET & SOC’Y 2011) (describing a survey of circumvention tools regarding threats to bloggers in the Middle East and North Africa).

47. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (opining, “without free speech and assembly discussion would be futile . . . that the greatest menace to freedom is an inert people” and that “public discussion is a political duty”) (*overruled on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

the right to acquire and extend information is the root of the First Amendment's protection of free expression in the U.S. Constitution. Comprehending the extent of a corporation's duty and the potential backlash the corporation can suffer in the public eye requires understanding the framework of the right to free expression.

II. LEGAL FRAMEWORK: FREEDOM OF EXPRESSION ON THE INTERNET

A. Domestic Law

The right to freedom of expression is one of the most vigorously protected privileges in the United States,⁴⁸ and forms the indispensable condition of nearly every other freedom enshrined in the U.S. Constitution.⁴⁹ As Justice Cardozo explained, without a free exchange of thought and speech, our nation's foundations of liberty or justice would not exist.⁵⁰ Justice Murphy, in *Thornhill v. Alabama*, emphasized the importance of freedom of discussion in providing information on contemporary issues and enabling individuals to cope with the exigencies of their period.⁵¹

In its 1997 decision *Reno v. ACLU*, the U.S. Supreme Court extended the protection of free expression to online speech.⁵² The Court held, as a matter of constitutional right, governmental regulation of speech online is more likely to interfere and hinder the free exchange of ideas than to encourage it.⁵³ In a cost-benefit analysis, the Court concluded the societal interest of protecting free

48. ACLU, *Freedom of Expression*, <http://www.aclu.org/free-speech/freedom-expression> (last visited March 30, 2013) ("Freedom of speech, of the press, of association, of assembly and petition – this set of guarantees, protected by the First Amendment, comprises what we refer to as freedom of expression.").

49. *Palko v. Connecticut*, 302 U.S. 319, 324-27 (1937) ("[L]iberty is something more than exemption from physical restraint.") (*overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784 (1969)).

50. *Id.* at 325 (finding free exchange of thought and speech fundamental to traditions and consciousness of American people).

51. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (stating, "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues . . .").

52. *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (discussing argument that Internet communication is entitled to highest protection from government intrusion).

53. *Id.* at 885 (finding "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it").

expression in a democratic society prevailed over “any theoretical but unproven benefit of censorship.”⁵⁴

The Internet’s role as a platform for millions to communicate, publish, and trade information globally prompted the *Reno* Court to reject Congress’s attempt to regulate the content of protected speech on the Internet.⁵⁵ In recent years, the Obama Administration, too, has underscored that the fundamental freedoms of expression, assembly, and association apply to online speech with as much force as they do offline.⁵⁶

B. International Law

The right to free expression is protected under Article 19 of the Universal Declaration of Human Rights⁵⁷ and the International Covenant on Civil and Political Rights (ICCPR).⁵⁸ Article 19 of the ICCPR states individuals shall have “the right to hold opinions without interference” and shall hold the right to freedom of expression through any media of choice, regardless of frontiers.⁵⁹ The language “any media of choice” indicates the ICCPR drafters’ foresight in acknowledging that future technological advancements may allow individuals to exercise freedom of expression on innovative platforms, such as the Internet.⁶⁰

The surge of digital networks as tools for sharing information and organizing movements throughout the Middle East prompted the United Nations (U.N.) to investigate the status of Internet freedom in May 2011.⁶¹ The resulting Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression (U.N. Report)

54. *Id.*

55. *Id.* at 863 (discussing District Judge Dalzell’s finding that the First Amendment denies Congress power to regulate content of protected speech online).

56. Posner, *supra* note 8.

57. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter *UDHR*] (stating at Article 19, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”).

58. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [hereinafter *ICCPR*] (including China, Egypt, Syria, and Tunisia as signatories).

59. U.N. Report, *supra* note 8, at ¶¶ 20-21.

60. *Id.*

61. *Id.*

describes the Internet as a key method by which individuals can exercise their right to freedom of opinion and expression,⁶² addressing the importance of the Internet and social media networking in disseminating information in real time and the increasing need to close the global digital divide.⁶³ The U.N. Report concluded that the framework of international human rights law is fully applicable to emerging communication technologies, including the Internet.⁶⁴ Dunja Mijatović, the Organization for Security and Co-operation in Europe's Representative on Freedom of the Media, concurred with the U.N. Report and urged governments to treat Internet access as a human right that should be preserved in their constitutions, stating, "It is only fitting to enshrine the right to access the Internet on exactly that level where such rights belong, as a human right with constitutional rank."⁶⁵ Mijatović's assertion highlights the view within the international legal community that the right to Internet access constitutes an extension of the right to free expression.

In December 2012, the International Telecommunications Union, a specialized body of the U.N. responsible for information and communication technologies, assembled the World Conference on International Telecommunications (WCIT).⁶⁶ The conference reviewed the binding global treaty, International Telecommunications

62. *Id.* at ¶ 20 (stating Articles 19 of UDHR and ICCPR guarantee use of Internet as means by which "individuals can exercise their right to freedom of opinion and expression").

63. Critics argue that promotion of access to the Internet, a luxury available to a small fraction of the world's population, is a misplaced endeavor, citing that efforts to improve access to water and food sources as intensely more imperative. Frank La Rue, U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, aptly notes the Internet is not solely a method of exchanging information on a virtual platform, but a promoter of numerous human rights, economic, social, and political development, and progress of humankind as a whole. *See id.* Protection of the Internet as stimulator of economic development and political discourse is a pressing issue for international law, particularly in countries whose central governments censor Internet communication. *See id.*

64. *Id.* (analyzing language of Article 19 of ICCPR).

65. *OSCE Media Freedom Representative Calls on Governments to Recognize Access to the Internet as a Human Right*, ORG. FOR SEC. AND CO-OPERATION IN EUROPE (July 15, 2011), <http://www.osce.org/fom/81006>.

66. Int'l Telecommunications Union [ITU], *World Conference on International Telecommunications (WCIT-12)* <http://www.itu.int/en/wcit-12/Pages/default.aspx> (last visited March 30, 2013).

Regulations (ITRs), which was signed by 178 countries worldwide.⁶⁷ The ITRs provide general principles for international interconnection and interoperability of information and communications services, and seek to ensure efficiency and widespread public access and usefulness.⁶⁸

The ITRs provide general principles for “international interconnection and interoperability of information and communications services,”⁶⁹ and aim to ensure international communication services remain publically available and efficient.⁷⁰ The ITRs had not been amended since their inception in 1988, so the 2012 conference was a crucial opportunity to update the regulations to answer current and emerging challenges on the ICT landscape.⁷¹ However, the ITRs do not cover Internet protocols or governance and many civil society members believe it should stay that way.⁷² Google warned that many signatories to the treaty would further an agenda of increased governmental control over Internet governance and attempt to promote guidelines that increase censorship.⁷³ Vint Cerf, known as one of the ‘founding fathers of the Internet,’ expressed the concern that certain Internet regulation frameworks being discussed would allow “any country wishing to suppress the Internet” to do so, without breaching international treaties.⁷⁴

Many governments fear a situation where people can communicate in real-time and quickly mobilize by using the Internet. Although the right to free speech on the Internet is domestically and internationally acknowledged as a fundamental human right, it is not without its limits. The next section explores some of these limitations.

C. Limitations on Freedom of Expression: Unprotected Speech

Tension surrounding governmental restriction of the right to free expression began long before the advent of the Internet. In the United

67. Int’l Telecommunications Union [ITU], *WCIT-12: Conference Overview* (2013), <http://www.itu.int/en/wcit-12/Pages/overview.aspx> (last visited March 30, 2013).

68. *World Conference on International Telecommunications*, *supra* note 66.

69. *Id.*

70. *Id.*

71. *Id.*

72. Alex Laverty et al., *Netizen Report: WCIT Edition*, GLOBAL VOICES ADVOCACY (Dec. 6, 2012), <http://advocacy.globalvoicesonline.org/2012/12/06/netizen-report-wcit-edition/>.

73. Rachel King, *Google Promotes ‘Take Action’ Campaign for Free, Open Web*, ZDNET (Nov. 20, 2012), <http://www.zdnet.com/google-promotes-take-action-campaign-for-free-open-web-7000007686/>.

74. *Id.*

States, the struggle against censorship has existed since the U.S. Constitution first commanded a right to free speech.⁷⁵ At times, governments must limit free speech to ensure public order, but a fine line separates using these restrictions to protect freedom from using them to maintain security.⁷⁶

The U.S. Supreme Court has identified several exceptions to the First Amendment's protection of free expression. In *Chaplinsky v. New Hampshire*, the Court refused to extend First Amendment protection to "fighting words," those that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."⁷⁷ The Court found this classification necessary to maintain safety and public order.⁷⁸ The Court additionally has refused to protect false statements⁷⁹ and "obscene" material.⁸⁰

The landmark case U.S. Supreme Court case *United States v. New York Times*⁸¹ tackled the intersection of free speech and national security. The Court placed a heavy burden on the Government, holding the Government may not block publication of information unless it proves the information would "surely result in direct, immediate, and irreparable"⁸² harm to the general public. The Government's reason to censor speech for national security concerns must be closely scrutinized before a court will consider the speech unworthy of First Amendment protection.⁸³

75. See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1642 (1967) (discussing the struggle faced by the Newspaper Guild in the 1930s, and reexamining First Amendment theory in an era where the mass media was repressing public opinion in the late 1960s).

76. *Id.* at 1649 (explaining role of exceptions to First Amendment protection to maintain public order).

77. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

78. *Id.* at 572 (reasoning "fighting words" hold little social value "as a step to truth").

79. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding libelous statements regarding public officials punishable if official proves the false statements were published with "actual malice").

80. *Miller v. California*, 413 U.S. 15, 24 (1973) (outlining three conditions for finding speech "legally obscene"); see also ACLU, *supra* note 49 ("[T]he obscenity exception to the First Amendment is highly subjective and practically invites government abuse").

81. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (holding that the U.S. Government had not met its burden in its attempts to censor the Pentagon Papers, which detailed the Government's secret political and military involvement in Vietnam, from publication in the New York Times on the basis of national defense).

82. *Id.* at 730 (Stewart, J., concurring).

83. *Id.* at 727 (Brennan, J., concurring).

In *Whitney v. California*, Justice Brandeis emphasized the importance of maintaining the balance between protecting freedom of speech and maintaining security, cautioning, “It is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path to safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”⁸⁴ An exercise of free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁸⁵

Using national security as a justification for limiting free speech raises contention when used by repressive governments. Threatened governments might exceed the narrow boundaries of legitimate limitations enumerated by U.S. courts⁸⁶ and may exceedingly monitor and censor dissident speech in the name of safeguarding national security and the citizens’ rights. The contention arises when the blocked speech merely offers a simple critique of the government or a discussion of current events and does not pose any actual threat to public safety.⁸⁷

D. Companies and International Law

A related question asks whether a multinational ICT company is bound by international law to comply when a government elicits the company to help censor speech for alleged national security concerns. Article 19 of the ICCPR outlines limitations to free speech, stating the right includes “special duties and responsibilities.”⁸⁸ Limitations include the respect of the rights and reputation of others and limitations in order to protect national security or public order.⁸⁹ Additionally, the U.N. Report notes that restrictions placed on free speech offline also apply to online speech.⁹⁰

The extent of a companies’ role in promoting universal human rights standards is largely contested. While there is increasing demand that companies do everything in their power to protect and advocate for accountability in human rights, companies do not want

84. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (*overruled on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

85. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

86. *See False Freedom: Online Censorship in the Middle East and North Africa*, 17 HUM. RTS. WATCH 1, 2-3 (2005).

87. *See id.*

88. ICCPR, *supra* note 58, at art. 19(3).

89. ICCPR, *supra* note 58, at art. 19(3)(a) and (b).

90. U.N. Report, *supra* note 8.

to impinge, overtake, or downgrade state responsibilities.⁹¹ The U.N. Report, like other international human rights treaties, largely applies to states as duty holders, rather than private non-state actors, such as companies.⁹² The Preamble of the Universal Declaration of Human Rights states, “every individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance”⁹³ Large companies might not be considered “organs of society,” but are an essential foundation of society and should bear the obligation of upholding universal human rights set forth in the Declaration.⁹⁴

Companies are not legally bound, under international law, to adhere to international human rights standards. However, companies increasingly face societal pressures and public critique.⁹⁵ Companies that violate societal standards are condemned by society.⁹⁶ Government might be insufficient to protect human rights, and might require cooperation from companies operating in the state to protect human rights.⁹⁷ Companies are important societal actors, exert powerful influence on the creation and enforcement of domestic law, and should be bound by international law.⁹⁸

Executives of ICT companies defend compliance with government requests by pointing to the main objective of a company: maximizing profit. Executives also argue that protection of human rights against which the ICT company’s technology may be used is not a legitimate company concern of the corporation.⁹⁹ Part III challenges these views,

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91. Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT’L & COMP. L. REV. 339 (2001).
92. U.N. Report, *supra* note 8.
93. UDHR, *supra* note 57, at Preamble.
94. Clapham & Jerbi, *supra* note 91, at 340 (quoting PETER FRANKENTAL & FRANCES HOUSE, HUMAN RIGHTS – IS IT ANY OF YOUR BUSINESS? (Amnesty Int’l U.K. & Prince of Wales Business Leaders Forum 2000)).
95. John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 833 (2007).
96. PETER FRANKENTAL & FRANCES HOUSE, HUMAN RIGHTS – IS IT ANY OF YOUR BUSINESS?, 83-85 (Amnesty Int’l U.K. & Prince of Wales Business Leaders Forum 2000).
97. Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001).
98. *Id.*
99. MACKINNON, *supra* note 10, at 33 (illustrating the Internet has had no effect on protection of human rights in China); Chander, *supra* note 32, at 4 (“[F]oreign media corporations, eager to ingratiate themselves to local governments in order to gain unimpeded access to the local market, might themselves serve as auxiliaries of authoritarian states.”).

arguing that a company's role as a social actor obliges it to protect free expression on the digital networks it provides.

III. THE CORPORATION AS A SOCIAL ACTOR: PROFITS VERSUS DUTY TO PROTECT

The notion that companies can focus on delivering value to investors and shareholders and not share responsibility for the broader impact of their business decisions on domestic and geopolitical power struggles—and ultimately the rights, freedoms, and even lives of people around the world—was once quaint but is now obsolete, as standards and expectations have evolved over the past decade.¹⁰⁰

A. *Profits No Longer the Guiding Light*

Modern conceptions of corporate social responsibility have shifted from solely maximizing profit towards broader social responsibility. Economist Milton Friedman once pronounced, "The social responsibility of business is to increase its profits."¹⁰¹ He argued the central objective of companies should be to maximize investment returns, subject only to narrowly defined ethical principles in respect of governing law.¹⁰² Recently, however, the ethical concern for profits has expanded to include "people, planet and profits" – a "triple bottom line."¹⁰³ In this model, companies monitor the method by which profit is made and implement internal accountability programs to ensure compliance with social standards, rather than seek out increased profits, no matter the collateral consequences.¹⁰⁴ Investors

100. MACKINNON, *supra* note 10, at 52.

101. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 122; *see also* Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, in ETHICAL THEORY AND BUSINESS 87, 91 (TOM L. BEAUCHAMP & NORMAN E. BOWIE eds., Prentice Hall 3d ed. 1988) ("[I]n my book 'Capitalism and Freedom,' I . . . have said that in such a society, 'there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits . . .'").

102. *See* John Parkinson, *The Socially Responsible Company*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 49 (Michael K. Addo ed., Kluwer Law Int'l 1999).

103. Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 9 (DOREEN MCBARNET, AURORA VOICULESCU & TOM CAMPBELL, eds., Cambridge Univ. Press 2007) (quoting J. ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (New Society Pub. 1997)).

104. MCBARNET, *supra* note 104.

increasingly have a “preference for process”¹⁰⁵ and businesses can no longer “hide behind the corporate veil, turning a blind eye” to the operational practices of the entities that the company does business with, such as repressive state governments.¹⁰⁶ Maximizing profits remains an integral component of good business practice, but it is no longer the “unique guiding light” for satisfying investors.¹⁰⁷

B. Guiding Principles of Social Responsibility

International corporate responsibility codes, including the U.N. Guiding Principles on Business and Human Rights,¹⁰⁸ and the Organization for Economic and Cooperative Development (OECD) Guidelines for Multinational Enterprises¹⁰⁹ set out companies’ responsibility to respect human rights. The U.N. Guiding Principles advises companies to act with “due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.”¹¹⁰ A growing number of transnational companies are incorporating explicit commitments in their internal business principles to uphold international human rights standards.¹¹¹ To date, the majority of successful corporate social responsibility audits have concerned child and forced labor, wages, worker safety, and environmental concerns.¹¹² Furthermore, activism by environmental and human rights groups successfully promoted environmental and labor concerns to companies. After increased pressure from significant investors, the companies incorporated better business practices with regard to the environment and the treatment of its employees.

105. Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 529 (2004) (“[C]onsumer preferences may be heavily influenced by information regarding the manner in which goods are produced.”).

106. Chander, *supra* note 32, at 23-24.

107. Michael K. Addo, *Human Rights and Transnational Corporations – An Introduction*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 15 (Michael K. Addo ed., Kluwer Law Int’l 1999).

108. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, A/HRC/17/31, ¶ 6 (Mar. 21, 2011) [hereinafter, *Guiding Principles*].

109. Org. for Econ. Co-operation & Dev., *OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context* 13 (2011).

110. *Guiding Principles*, *supra* note 108.

111. Clapham & Jerbi, *supra* note 91, at 340-41.

112. Chander, *supra* note 32, at 6-7; *See also* MACKINNON, *supra* note 10, at 175-76.

The U.N. Guiding Principles and OECD's Guidelines do not directly mention a duty to protect the right to free speech, aside from a general call for corporations to respect human rights.¹¹³ Treatises on corporate social responsibility also fail to consider that ICT companies, responsible for providing information services on the Internet, should have a duty to protect the right to free expression.¹¹⁴ However, in a world where recent revolutions have been fueled by online discourse, it is increasingly vital for ICT companies to apply strict standards to protect the speech of virtual freedom fighters in the "new marketplace of ideas"¹¹⁵ and to incorporate an explicit commitment to uphold the right to freedom of expression on the Internet in their company policies.¹¹⁶

C. Transparency of Business Practices on the Internet

The increased flow of information on the Internet allows for more transparency of business practices, making companies subject to a higher degree of public scrutiny. Today, investors are concerned with the reputation of companies they invest in and often extensively research the company's policies and means of operations. Even without direct legal obligations to uphold international human rights standards, companies may still be "tried in the court of public opinion," according to the standards of the international treaties.¹¹⁷

The modern shareholder often acts an institution with community interests that go beyond profit maximization.¹¹⁸ Numerous investors now follow socially responsible investing (SRI), or ethical investing, in which investors pre-screen investment portfolios for financial profit and social benefit.¹¹⁹ While socially responsible investors often exclude whole products from an investment plan, such as tobacco or guns,¹²⁰ the concept of ethical investing can be broadened to apply to how companies, as a whole, are viewed in the age of increased public scrutiny. If a company is perceived to cooperate with repressive

113. *Guiding Principles*, *supra* note 108, at ¶ 6.

114. Chander, *supra* note 32, at 7.

115. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

116. Chander, *supra* note 32, at 8.

117. Ruggie, *supra* note 95, at 833.

118. Addo, *supra* note 107, at 15.

119. Paul Sullivan, *With Impact Investing, a Focus on More Than Returns*, N.Y. TIMES, Apr. 23, 2010, <http://www.nytimes.com/2010/04/24/your-money/24wealth.html>.

120. *Id.*

governments in suppressing free expression, socially responsible investors will likely invest elsewhere.¹²¹

D. Corporations' Protection of An Open Internet Will Bring Long Term Benefits

The contemporary demands of society push companies beyond roles as simple economic bodies vying for the supreme return on profits. Instead, companies are pressured into playing a role in the social and political domains that traditionally were reserved for government policy alone.¹²² The company's role as a global citizen is instrumental in shareholder wealth maximization.¹²³ This viewpoint regards protection of human rights and good business practices as imperative in retaining long-term business success, termed as "shared value."¹²⁴ A company exhibits shared value when it aligns business practices and strategies with societal values, maximizing its long-term ability to "drive the next wave of innovation and productivity growth in the global economy."¹²⁵

The digital age has brought about an increased flow of free information to companies. Since the object of ICT companies is to facilitate, rather than hinder communication, such companies should be aware of the ethical concerns of censoring online dissident speech. Adam Kanzer, managing director and general counsel at Domini Social Investments, noted that freedom of expression and privacy are core elements of ICT companies, stating, "If people don't trust the Internet and believe they are secure, then that is counterproductive to [any] business."¹²⁶

Free and open access to information on the Internet is a valuable tool for modern businesses to reach their consumer bases. Former Secretary of State Hillary Clinton noted that a free and open Internet is essential for all companies operating in the modern business arena, "Whether it's run with a single mobile phone or an extensive corporate network, it's hard to find any business today that doesn't depend in some way on the Internet and doesn't suffer when networks

121. See generally MACKINNON, *supra* note 10, at 176 (reporting socially responsible investment funds held by U.S. investors in 2010 amounted to \$3.07 trillion from a total of \$25.2 trillion contained in the U.S. investment marketplace).

122. Addo, *supra* note 107, at 4.

123. Chander, *supra* note 32, at 24.

124. MACKINNON, *supra* note 10, at 176-77 (citing Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV. (2011)).

125. MACKINNON, *supra* note 10, at 176-77.

126. Maggie Shiels, *Tech Giants in Human Rights Deal*, BBC, Oct. 28, 2008, <http://news.bbc.co.uk/2/hi/7696356.stm>.

are constrained.”¹²⁷ The possibility of a short-term profit should not jeopardize the rights of individuals to have open access to the Internet in the future. Any negative impact on the viability of Internet access will also hurt business operations in the long run.¹²⁸

E. Steps to Ensure Internal Company Governance

Telecommunications companies must place increased scrutiny on all profit producing endeavors to ensure compliance with the right to freedom of expression on the Internet. This is necessary not only to satisfy their societal judges, but also to ensure a long-term, successful business operation. Effective regulation must be based on a framework of internal accountability.¹²⁹ Ethical investors are primarily concerned with the positive steps that companies are taking to prevent complicity in human rights violations.¹³⁰

Proactive steps ICT companies can take in setting up heightened accountability and compliance procedures, might include: (1) implementing internal review procedures to detect direct or indirect corporate complicity in any request to infringe the right to free expression; (2) actively communicating with individuals affected by the company’s potential adverse complicity; and (3) ultimately operating so as not to contribute to a repressive state’s existing actions to impinge on the civil and political freedom of the community.¹³¹ The U.N. Guiding Principles on Business and Human Rights also provides insight into the steps companies can take to ensure protection of the public interest. As applied to ICT companies, a company should: (1) outline and enforce company policy that mandates protection of free expression; (2) advance a “due-diligence process to identify, prevent, and mitigate” any impact on infringements to the right of free expression; and (3) begin remediation processes for any adverse effects on online speech that the company’s current practices cause or contribute to.¹³²

127. Clinton, *supra* note 18.

128. *Id.*

129. Addo, *supra* note 107, at 8.

130. Clapham & Jerbi, *supra* note 91, at 348; see also CHRISTOPHER L. AVERY, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE 22 (Amnesty Int’l U.K. 2000) (noting Sir Geoffrey Chandler, the former Chair of the Amnesty Int’l U.K. Business Group, stated, “Silence or inaction will be seen to provide comfort to oppression and may be adjudged complicity Silence is not neutrality. To do nothing is not an option.”).

131. Erika R. George, *Tweeting to Topple Tyranny, Social Media and Corporate Social Responsibility: A Reply to Anupam Chander*, 2 CAL. L. REV. CIR. 23 (2011); see also Clapham & Jerbi, *supra* note 91, at 347-48.

132. *Guiding Principles*, *supra* note 108.

IV. OPTIONS FOR EXTERNAL COMPANY REGULATION

In fiercely competitive industries, no company acting alone has the power to solve human rights problems.¹³³

Although it is vital for a ICT company to clearly monitor its internal affairs and efforts to protect the consumer right to free expression on the Internet, it is unlikely that a single company alone will be able, or willing, to protect free expression by any significant measure in a repressive state. Two regulatory avenues for holding companies accountable and providing those same companies with support for upholding the right to free expression include (1) a domestic legislative approach following the Global Online Freedom Act (GOFA) and (2) a private multi-stakeholder approach following the Global Network Initiative.

A. *Legislation: Global Online Freedom Act (GOFA)*

In many countries, the principal method for holding companies accountable to the public interest is through legislation.¹³⁴ Over the last several years, the United States has debated legislation to aid companies facing foreign government censorship requests. GOFA calls for the President to seek to obtain the agreement of other countries to protect Internet freedom.¹³⁵ While Congress has refused to enact previous GOFA bills,¹³⁶ the Act highlights the fundamental component of U.S. foreign policy to promote the rights of all individuals to “freedom of expression and opinion” including the right to “impart information and ideas through any media and regardless of frontiers and without interference”¹³⁷

GOFA proposed to monitor censorship requests from Internet-repressive states and bar U.S. businesses from working with governments that wield Internet access as “a tool of censorship and surveillance.”¹³⁸ GOFA would mandate that U.S. policy deter U.S. business from “cooperating with officials of Internet-restricting countries in effecting the political censorship of online content,”¹³⁹ in order to protect U.S. taxpayer efforts of promoting free expression for

133. Posner, *supra* note 8.

134. MACKINNON, *supra* note 10, at 172.

135. Global Online Freedom Act of 2013, H.R. 491, 112th Cong., §102(1) (Apr. 6, 2011),

136. *See e.g.*, Global Online Freedom Act of 2011, H.R. 3605, 112th Cong. (Dec. 8, 2011).

137. H.R. 491, §101(1).

138. H.R. 491.

139. H.R. 491, §101(3).

people not only in the United States, but also in undemocratic and repressive countries.¹⁴⁰

Regulation by the government, however, does not always provide the best solution, and can often raise more issues than it solves. A facial reading of GOFA suggests it is a good attempt at regulating the dilemma faced by ICT companies, but a closer analysis proves otherwise. First, the information technology industry is constantly evolving and the comparatively slow legislative process does not match the corporate innovation cycles. Legislation to regulate activity in this field becomes remedial rather than preventative. Instead of predicting the precise issues that may be faced by the corporation, the legislation is merely reactive to already harmful problems.

Second, GOFA was originally drafted to address problems faced by American companies operating in China.¹⁴¹ But as Internet globalization spreads, problems faced by ICT companies become increasingly complex. GOFA's "one-size-fits-all legislative approach" is unlikely to handle the unique issues faced by U.S. ICT companies forging business relationships in countries other than China.¹⁴²

The issue of enforcement poses a notable problem when attempting to implement domestic legislation, such as GOFA. A repressive government is usually an integral component of the problem faced by the company in the first place. Using domestic or international accountability legislation to combat a company's relationship with a repressive foreign government might fail on the level of enforcement. The future of GOFA is still uncertain, but the prospect that an American law will lead to global enforcement is bleak.¹⁴³ If more countries begin enacting codes to police content online, the efforts for companies to protect free speech online may become even more difficult. Urging countries to determine how to police content domestically¹⁴⁴ will inevitably create difficulties in maintaining a free and open Internet worldwide. Just as a one-size-fits-all approach will be unable to tackle all of the issues faced on the

140. H.R. 491.

141. MACKINNON, *supra* note 10, at 174; *see also* Declan McCullagh, 'Internet Freedom' Bill Targeting China Cooperation Faces Rough Road, CNET, May 28, 2008, http://news.cnet.com/8301-13578_3-9952815-38.html.

142. MACKINNON, *supra* note 10, at 174.

143. *See generally*, *Russia Slams US Global Online Freedom Act as 'Cold War Scheme'*, RUSSIA TODAY (Dec. 19, 2011), <http://rt.com/news/usa-online-freedom-business-181/>; *see also* Bauml, *supra* note 22, at 719.

144. *See* Trent Nouveau, *Pentagon Opposes UN Regulation of the Internet*, TG DAILY (Oct. 21, 2011), <http://www.tgdaily.com/security-features/59195-pentagon-opposes-un-regulation-of-the-internet>.

Internet, numerous roadblocks in cyberspace will prove counteractive to efforts to protect free speech. If more countries begin policing content for ideological correctness, the promise of technology to drive global understanding and the free exchange of information, ideas, and innovation is in danger of extinction.¹⁴⁵

B. Multi-Stakeholder Program: The Global Network Initiative

The Internet on which the future depends can't be maintained as an open and global network if we don't work together to figure out how to push back against those who care more about political domination than empowering innovation. My problem is your problem. It's all of our problem.¹⁴⁶

The Global Network Initiative (GNI) is a multi-stakeholder group of ICT companies, civil society organizations, socially responsible investors, and academics, formed to collaboratively "protect and advance the freedom of expression and privacy in the ICT sector."¹⁴⁷ GNI was formed in 2008, after companies in the private sector came under fire at a 2006 congressional hearing for allegedly aiding the Chinese government's system of censorship and surveillance.¹⁴⁸

Three multinational ICT companies – in particular, Google,¹⁴⁹ Microsoft, and Yahoo – joined GNI and collectively released a list of operational guidelines to govern the corporate response to requests from repressive states to aid in censorship and surveillance.¹⁵⁰ The guidelines require companies to interpret government restrictions and demands in such a way as to minimize the potential negative effects on freedom of expression.¹⁵¹ GNI is committed to increasing the

145. Posner, *supra* note 8.

146. *Id.*

147. See GLOBAL NETWORK INITIATIVE, <http://globalnetworkinitiative.org/> (last visited March 30, 2013) (outlining GNI's core principles, implementation guidelines, governance, accountability and learning framework, and governance charter).

148. MACKINNON, *supra* note 10, at xiv.

149. See Shiels, *supra* note 126. Google's director of global public policy, Andrew McLaughlin, describing Google's reasoning behind joining GNI, states, "We have joined this initiative because we know that a wide range of groups working together can achieve much more than the company acting alone." *Id.*

150. Chander, *supra* note 32, at 37; See also *Diverse Coalition Launches New Effort to Respond to Government Censorship and Threats to Privacy*, GLOBAL NETWORK INITIATIVE (Oct. 26, 2008), http://www.globalnetworkinitiative.org/newsandevents/Diverse_Coalition_Launches_New_Effort_To_Respond_to_Government_Censorship_and_Threats_to_Privacy.php.

public credibility, legitimacy, and trust of ICT companies through the creation of accountability processes to confirm its steps towards protecting Internet freedom.¹⁵² The GNI processes provide: (1) a framework for companies, rooted in international standards, that ensures accountability of the ICT sector through independent assessment; (2) opportunities for policy engagement; and (3) shared learning opportunities across stakeholder boundaries.¹⁵³

GNI appears to remedy many of the critical issues raised by GOFA.¹⁵⁴ First, the conglomeration of expertise aids participating companies in identifying potential problems and exploring solutions to prevent or remedy them, whereas the legislative approach is solely remedial. GNI proposes to “assess the human rights climate in a country before closing business deals and create an accountability system to ensure employees and partners follow suit.”¹⁵⁵ GNI does not require ICT companies to completely withdraw from a repressive state, but supports companies in maintaining its stance to protect the freedom of expression and privacy while continuing operations within the repressive state. GNI provides the platform for industry partners, including academics, activists, and investors, to navigate the challenges of repressive systems together.¹⁵⁶ The continued evolutionary process negates the “one-size-fits-all” approach of legislation, and rather tackles issues as presented in the corporate realm. GNI also incorporates a system of checks and balances to assess whether participating companies are meeting their commitments. The GNI founding companies, Google, Microsoft, and Yahoo, completed the first fully independent assessments of their corporate policies and procedures in regard to privacy rights and freedom of expression.¹⁵⁷

151. Amy Lee, *Twitter, Facebook Yet To Join Free Speech Pact*, HUFF. POST (Mar. 7, 2011) http://www.huffingtonpost.com/2011/03/07/global-network-initiative_n_832408.html.

152. *See Principles on Freedom of Expression and Privacy*, GLOBAL NETWORK INITIATIVE, available at http://globalnetworkinitiative.org/sites/default/files/GNI_-_Principles_1_.pdf.

153. *Id.*

154. *See generally* Bauml, *supra* note 22, at 719.

155. Shiels, *supra* note 126.

156. *Id.*

157. *First Independent Assessments of GNI Founding Companies Completed*, GLOBAL NETWORK INITIATIVE (Mar. 6, 2012) available at http://www.globalnetworkinitiative.org/newsandevents/First_independent_assessments_of_GNI_founding_companies_completed.php (determining how respective corporations have implemented GNI goals as of March 2012).

The face value of GNI provides an excellent external corporate regulation model, but it still presents a number of challenges. First, GNI is new.¹⁵⁸ For GNI to succeed as a global initiative, it must increase its global presence. By early 2012, no new multinational ICT companies joined GNI aside from the three founding companies.¹⁵⁹ Additionally, key Internet companies like Facebook, Skype, and Twitter have not joined GNI. These companies were integral in helping demonstrators across the Middle East organize the protests in 2011.¹⁶⁰ Other international media giants, such as Siemens, Nokia, and Vodafone, have complied with the governments of Iran and Egypt in infringing rights to privacy and free speech.¹⁶¹ Although GNI purports to aid companies placed in the dilemmas similar those faced by Vodafone in Egypt, the aid will not be successful unless a larger number of international telecommunications companies sign onto the program. Without a sufficiently sized membership base, GNI's influence faces severe limitations. GNI's voluntary membership

158. *Principles on Freedom of Expression and Privacy*, *supra* note 152.

159. *Participants*, GLOBAL NETWORK INITIATIVE, <http://globalnetworkinitiative.org/> (last visited Mar. 20, 2012).

160. Evgeny Morozov, *Wiki Rehab*, NEW REPUBLIC (Jan. 7, 2011), <http://www.tnr.com/article/politics/81017/wikileaks-internet-pirate-party-save>. (finding little indication that companies will join GNI in the future, "in a bizarre explanation of its reluctance to join, Facebook – currently valued at \$50 billion – said it was just a small company that couldn't afford to pay the \$250,000 joining fee"); *see also* Amy Lee, *supra* note 156 (Twitter declined to comment on its position. Andrew Noyes, the Facebook spokesman, stated, "As Facebook grows, we'll continue to expand our outreach and participation, but it's important to remember that our global operations are still small, with offices in only a handful of countries."); *see also* Larry Downes, *Why No One Will Join the Global Network Initiative*, FORBES (Mar. 30, 2011), <http://www.forbes.com/sites/larrydownes/2011/03/30/why-no-one-will-join-the-global-network-initiative/>.

161. *See* Christopher Rhoads & Loretta Chao, *Ran's Web Spying Aided by Western Technology*, WALL ST. J. (June 22, 2009), <http://online.wsj.com/article/SB124562668777335653.html> (reporting European telecommunications companies, including Siemens AG and Nokia Corp., aided the Iranian regime in developing "one of the world's most sophisticated mechanisms for controlling and censoring the Internet," which allows the regime to monitor the content of online speech on a massive scale); *see also* Satter, *supra* note 16 (Egyptian authorities allegedly forced Vodafone Group PLC to send pro-government text messages to its consumer base during the uprisings in early 2011. Vodafone stated that it protested the action to the Egyptian authorities, arguing, "that the current situation regarding these messages is unacceptable." *Id.* The company further states that it asked that "all messages should be transparent and clearly attributable to the originator," however, when received the sender's identity showed only as "Vodafone." Satter *supra* note 16).

means companies cannot be compelled to join and can easily escape the initiative's mandate.¹⁶² Even if companies do join GNI as it currently stands, no substantial penalties deter companies from skirting the GNI Principles.¹⁶³

Although there is no fear of legal sanction, GNI may still publicize a participating company's noncompliance to increase pressure from socially responsible investors. Despite the hurdles faced by GNI, the Initiative still potentially allows ICT companies to create a collaborative force in the social and political arena. If more ICT giants are successfully recruited to GNI, the initiative will remain a viable aid to ICT companies conducting business with repressive foreign governments.

V. CONCLUSION: THE COMPANY'S ROLE IN INFLUENCING LEGISLATION

In this heightened commercial environment, the transnational corporation has become an indispensable pivot in the progressive development of society. The private transnational corporation can now be said to have matured into a mainstream policy institution and less of an isolated private commercial undertaking.¹⁶⁴

Multinational companies have long influenced national and international policy, but the involvement of companies in public policy has never been as visible or vital as it is today.¹⁶⁵ Consequently, the role of an ICT company as a social actor is imperative to influencing regulation of the right to free expression and privacy on the Internet.

The power of ICT companies as social actors was recently evidenced in opposition to the Stop Online Piracy Act (SOPA) in the United States.¹⁶⁶ GNI and other civil society organizations,¹⁶⁷

162. Chander, *supra* note 32, at 38.

163. *Id.*

164. Addo, *supra* note 107, at 7.

165. *Id.* at 4.

166. Stop Online Piracy Act, H.R. 3261, 112th Cong. (Oct. 26, 2011).

167. See e.g., *Public Interest Letter to House Judiciary Committee Opposing H.R. 3261, the Stop Online Piracy Act*, NEW AM. FOUND. (Nov. 15, 2011) available at http://newamerica.net/publications/resources/2011/Public_Interest_Letter_Opposing_HR_3261 ("Under section 102 of the bill, a nondomestic startup video-sharing site with thousands of innocent users sharing their own non-infringing videos, but a small minority who use the site to criminally infringe, could find its domain blocked by U.S. DNS operators. Countless non-infringing videos from the likes of aspiring artists, proud parents, citizen journalists, and

concerned with certain provisions of SOPA that “could have dangerous unintended consequences for freedom of expression and economic innovation in the [United States] and around the world,”¹⁶⁸ released statements urging Congress to consider legislation that protects intellectual property rights while safeguarding freedom of expression on the Internet.¹⁶⁹ Leading Internet companies, including AOL, eBay, Facebook, Google, LinkedIn, Mozilla, Twitter, Yahoo, and Zynga, joined in protest of SOPA as a part of “American Censorship Day” held in November 2011.¹⁷⁰ The unprecedented collaboration illustrated the power companies can exert in the political sphere when rights to freedom of expression are at risk. The initiative, successful in raising awareness of the issues associated with SOPA and drumming up support throughout the U.S., demonstrates the pressure that must be placed on foreign governments that infringe freedom of speech.

On the heels of SOPA, the Lebanese Ministry of Information proposed a similar effort to regulate the right to a free and accessible Internet in the Lebanese Internet Regulation Act (LIRA).¹⁷¹ While the Lebanese Government claims that LIRA promotes freedom of expression in Lebanon, making access to information available and [raising] the barrier and obstacles in front of the flow [of

human rights activists would be unduly swept up by such an action. Furthermore, overreach resulting from bill is more likely to impact the operators of smaller websites and services that do not have the legal capacity to fight false claims of infringement.”).

168. *Open Letter on Freedom of Expression, Intellectual Property and H.R. 3261, the Stop Online Piracy Act*, GLOBAL NETWORK INITIATIVE (Nov. 15, 2011) available at http://www.globalnetworkinitiative.org/newsandevents/Open_letter_on_freedom_of_expression_intellectual_property_and_H_R_3261_the_Stop_Online_Piracy_Act.php.
169. *Id.*
170. Alex Fowler, *Mozilla Fights for the Internet's Future*, MOZILLA BLOG (Nov. 15, 2011), <http://blog.mozilla.com/blog/2011/11/15/mozilla/> (“We believe [SOPA] threatens our ability as an industry to continue to offer many important software and web services to the hundreds of million of users who rely on them.”).
171. Joseph Choufani, *Stop LIRA: The Lebanese Internet Regulation Act*, @JOSEPH'S (Mar. 11, 2012, 10:28 AM), <http://josephchoufani.blogspot.com/2012/03/stop-daouka-lebanese-internet.html>. The original text of the Act can be found in Arabic at <http://annahar.com/article.php?t=mahaly&p=4&d=24669>. The Lebanese Internet Regulation Act instructs website administrators to contact the ministry of information when there is an infringement of civil liberties. *Id.* The ministry will use this information to monitor and in turn protect intellectual property rights. *Id.* The proposal will empower the ministry to prosecute any individuals who attempt to rob protected content without consent. *Id.*

information],”¹⁷² the proposal conflicts with the Act’s real consequences. The implications of the law, if passed, will require all content to be approved by the Ministry of Information, where websites will be “treated as . . . newspaper[s] and . . . regulated by related archaic laws.”¹⁷³ An outcry in the Lebanese blogosphere and social media community caused the Lebanese cabinet to delay discussion of LIRA in order to revisit and redraft the Act’s language.¹⁷⁴

In the age of a closing digital divide¹⁷⁵ and increased use of Internet communication to analyze current social and political affairs, ICT companies will continue to confront government requests to infringe the rights to free expression and privacy of its consumer base and proposed legislation that limits the exercise of free speech online. The company will need governmental support or private sector support when refusing to act as an agent of suppression. Legislative attempts at external corporate regulation provide limited solutions through a one-size-fits-all approach. A better approach might be found in collaborative multi-stakeholder programs, such as the Global Network Initiative, which provide support as companies face new dilemmas. The key to a successful multi-stakeholder collaboration will be to recruit more corporate participants to join the initiative. Following a successful “American Censorship Day,” increased participation in GNI could be right around the corner. In an age when digital censorship and surveillance present growing incentives to authoritarian governments, the ICT company’s duty to protect the right to free expression online is ever more imperative.

172. *Id.*

173. *Id.*

174. *Id.*

175. Ali, *supra* note 3.